Nos. 93-762 and 93-1094

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JEROME B. GRUBART, INC.,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
GREAT LAKES DREDGE & DOCK COMPANY and
JEROME B. GRUBART, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER CITY OF CHICAGO

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QUESTIONS PRESENTED

1. Whether a federal court, in assessing whether a case in which not all parties are engaged in traditional maritime activities has a sufficient relationship to traditional maritime concerns to be a "case of admiralty and maritime jurisdiction," should consider the totality of the circumstances.

2. Whether the Admiralty Extension Act, 46 U.S.C. App. § 740, confers admiralty jurisdiction over a tort, the impact of which is felt ashore at a time and place remote from a wrongful act committed in navigable waters.

3. Whether the Seventh Circuit erred in its application of the *Sisson* test in this case.

PARTIES TO THE PROCEEDING

The petitioners in these consolidated cases are the City of Chicago and Jerome B. Grubart, Inc. The respondent is Great Lakes Dredge & Dock Company.

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BRIEF FOR PETITIONER CITY OF CHICAGO

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, as modified on the denial of rehearing, Pet. App. 18a-20a, is reported at 3 F.3d 225 (7th Cir. 1993). The opinion of the district court, Pet. App. at 21a-50a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1993, and modified on October 7, 1993. A petition for rehearing, filed by petitioner in No. 93-762, Jerome B. Grubart, Inc. ("Grubart"), was denied on Oc-

tober 7, 1993. Grubart's petition for a writ of certiorari was filed on November 15, 1993. The City of Chicago's petition for a writ of certiorari was filed on January 5, 1994. The petitions were granted and the cases consolidated on February 22, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. Art. III, § 2:

> The judicial power shall extend . . . to all Cases of admiralty and maritime Jurisdiciton. . . .

28 U.S.C. § 1333(1):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

46 U.S.C. App. § 183(a):

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except [in certain cases involving loss of life or bodily injury] exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. App. § 185:

> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition, such sums, or ap-

> proved security therefor, as the court may from time to time fix as necessary to carry out the provisions of [46 U.S.C. App. § 183], or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of [46 U.S.C. App. § 183]. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. App. § 740:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

STATEMENT

A freight tunnel system ("the tunnel") runs beneath the downtown district of the City of Chicago ("the Loop") and crosses under the Chicago River near the Kinzie Street Bridge. In May 1991, the City entered into a contract with respondent Great Lakes Dredge & Dock Company ("Great Lakes"), pursuant to which Great Lakes was to remove and replace the piling clusters at five bridges in the river, including the Kinzie Street Bridge. J.A. 16-30. The contract obligated Great Lakes to familiarize itself with the surface and subsurface conditions at the work site (J.A. 22-23) and warned Great Lakes not to drive the pilings "at any other location than that specified by the City. The position of the piles shall not be changed to any degree, as even slight position changes may cause serious damage to various underground . . . structures." J.A. 28. The contract further provided that "[s]hould the contractor damage any of these . . . structures through carelessness or improper positioning he will be obliged to repair such damages . . . at his own expense." J.A. 28.

Great Lakes performed the work provided for in the contract from two barges. J.A. 32-33, 48-50, 55-67. The barges functioned as stationary work platforms and had no means of locomotion aboard; they were taken to a worksite by tugboats and then secured. J.A. 32-33, 48-50, 55-57. Notwithstanding the provisions of the contract, Great Lakes installed the pilings at the Kinzie Street Bridge "in a location other than originally designated in its Contract with the City" (R. 44, Exh. A. at ¶ 18), allegedly with the approval of the City officials supervising the project. J.A. 33. Great Lakes completed the work in September 1991. J.A. 32-33.

On April 13, 1992, more than six months later, the tunnel collapsed near the Kinzie Street Bridge. Pet. App. 21a. Water from the Chicago River entered the tunnel, and numerous buildings in the Loop connected to the tunnel were flooded. Pet. App. 21a-22a. Tens of thousands of businesses and individuals who work and live in the Loop have filed more than fifty class-action and individual lawsuits against the City and Great Lakes in the Circuit Court of Cook County, Illinois, alleging that Great Lakes tortiously damaged the tunnel while pile driving and that the City tortiously failed to repair the tunnel in the months before the tunnel flooded. Pet. App. 22a-23a. Grubart, petitioner in No. 93-762, is a member of the plaintiff class that has been certified in the consolidated state-court actions. The state-court plaintiffs allege that they were injured both by the tunnel flood and by the subsequent decision to interrupt electrical service to the area. The remedial measures that were used to repair the breach in the tunnel ultimately caused the Chicago River to be temporarily closed to vessels (Pet. App. 2a n.1), although none of the plaintiffs in the consolidated class action alleges injury because the River was closed. Plaintiffs claim hundreds of millions of dollars in damages. The state-court defendants—the City and Great Lakes—also sought contribution from each other in proportion to the responsibility of each for plaintiffs' damages.

On October 6, 1992, Great Lakes filed a petition in the district court pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. App. § 181 *et seq.*, which entitles the owner of a vessel to limit its liability for property damage incurred without the privity or knowledge of the owner of the vessel to the value of the owner's interest in the vessel. *Id.* § 183(a). In its petition, Great Lakes sought exoneration from or limitation of any liability it may incur from claims arising out of the tunnel flood. Great Lakes denied that its pile-driving activities had caused the flood, but sought limitation of whatever liability it may have on the basis that the pile driving had taken place from barges that were floating in navigable waters. J.A. 34-37. Great Lakes also sought indemnity and contribution from the City should Great Lakes be held liable to any of the plaintiffs. J.A. 37-40. Great Lakes posted a bond in the amount of $633,940, representing the value of the vessels it used in the Kinzie Street Bridge project, and hence the maximum amount that could be recovered against it should its defense under the Limitation Act be sustained. R. 3 (attachment).

On motions of the City and Grubart, the district court dismissed the petition for lack of subject matter jurisdiction and for failure to state a claim. Pet. App. 21a-50a. Applying the test articulated in *Sisson v. Ruby*, 497 U.S. 358 (1990), the court held that it lacked admiralty jurisdiction over Great Lakes' petition because there was no substantial relationship between the activity giving rise to the incident and traditional maritime activity. The court concluded:

> In summary, the relevant facts alleged to be present in this now historic calamity to our city do not involve traditional maritime concerns. Federal admiralty jurisdiction will be sustained only if a case presents the need to protect maritime commerce through adherence to a uniform and specialized set of rules such as those involving navigation and seaworthiness. There is no compelling reason to adjudicate the host of issues raised by the pleadings under this special-

> ized set of rules. Traditional common law rules of tort should do quite nicely here; the specialization of admiralty rules is not necessary. The totality of the circumstances lead[s] unyieldingly to that conclusion. Simply put, we have land-based injuries caused by land-based activities undertaken upon a non-moving vessel on a river acting as a stationary work platform. The maritime connection of the principal activities is neither direct nor material and suppl[ies] none of the causation for the alleged injuries. There are not traditional maritime concerns present here, and, without [them], no admiralty jurisdiction.

Pet. App. 37a-38a.[1]

In reaching its decision, the court applied the totality of the circumstances test derived from the Fifth Circuit's decision in *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and noted by this Court in *Sisson*, 497 U.S. at 365 n.4. See Pet. App. 32a-33a. *Kelly* outlined four factors for the court to consider in determining whether there is a nexus between the events underlying a case and traditional maritime activity: (1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. See 485 F.2d at 525.

The Seventh Circuit reversed, holding that there was jurisdiction, and remanded the case for further proceedings. Pet. App. 1a-15a. The court of appeals held that the district court had erred in using *Kelly*'s totality of the circumstances test to determine whether admiralty jurisdiction existed. Pet. App. 6a-7a. Instead, the court stated that *Sisson* required it to limit its analysis:

> After *Sisson*, in ascertaining the existence of admiralty jurisdiction we ask three questions about the incident giving rise to the alleged wrong: (1) did it

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[1] In addition, the court found that Great Lakes' petition failed to state a claim upon which relief could be granted because Great Lakes was foreclosed, as a matter of law, from limiting its liability under the Limitation Act. Pet. App. 43a-49a.

> occur on the navigable waters of the United States? (2) did it pose a potential hazard to maritime commerce? and (3) was it substantially related to traditional maritime activity?

Pet. App. 6a.

Using this test, the Seventh Circuit began with the locality requirement and held that the alleged tort in this case was "the negligent driving of pilings into the riverbed" (Pet. App. 7a-8a) and that this wrong had occurred in navigable waters. Pet. App. 8a. The City had argued (Pet. App. 8a) that the site of the injury in this case—flooding of buildings in the Loop—was on land, at a time and place too remote from Great Lakes' alleged wrongful conduct to satisfy the locality requirement. Relying on the Admiralty Extension Act, 46 U.S.C. App. § 740, the court below rejected this argument:

> We believe that the requirement of temporal proximity is nothing more than a specialized rule of proximate causation. And we do not believe that the elapse of six months, the period of time between Great Lakes' completion of its work and the flood, bars application of the Admiralty Extension Act.

Pet. App. 8a. The court held that the incident in this case satisfied the locality requirement of admiralty jurisdiction. Pet. App. 9a.

Turning to the nexus requirements, the court examined first whether the incident posed a potential hazard to maritime commerce. The court concluded that the installation of pilings in the Chicago River did pose such a hazard "[b]ecause commerce on the river was *actually* disrupted for more than a month." Pet. App. 10a (emphasis in original). Next, the court considered whether the activity in which Great Lakes was involved was substantially related to traditional maritime activity. The court concluded that sinking pilings in the Chicago River was related to maritime activity because one purpose of the pilings was to aid navigation. Pet. App. 10a-11a.[2]

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[2] The court of appeals also concluded that Great Lakes' defense under the Limitation Act raised issues of fact, and thus its petition

SUMMARY OF ARGUMENT

Grubart and the other state-court plaintiffs sought to recover from the City and Great Lakes by asserting that their property—basements and other property throughout the Loop—was tortiously damaged by the negligence of Great Lakes and the City. In this action, Great Lakes seeks to obtain an adjudication of this controversy in federal court under federal admiralty law, thus preempting plaintiffs' and the City's state law rights—as well as the City's state-law defenses to Great Lakes' contribution and indemnity action against it—by arguing that this dispute falls within the district court's exclusive admiralty jurisdiction.

1. The fundamental purpose of federal admiralty and maritime jurisdiction is to ensure that those engaged in maritime activities need not be cognizant of and comply with a variety of state and local laws as they sail through multiple jurisdictions, nor fear the consequences of encountering vessels from other jurisdictions that would not be familiar with local laws if they governed navigation and similar maritime endeavors. Thus, federal admiralty jurisdiction displaces state tort law, and supplies uniform federal rules of decision, for cases in admiralty arising from maritime torts. This case does not implicate that purpose, and the propriety of litigating it in federal court under federal rules of decision is far from clear. The asserted legal wrong for which plaintiffs seek to recover—flooding of downtown basements—did not occur on navigable waters. Neither did the City's allegedly negligent failure to repair the tunnel with sufficient speed. When parties make intentional decisions to venture onto (or at least near) navigable waters, it may well be fair that they be held to the federal rules of decision that have long governed there, at least when they cause injury on or near the water. Grubart and the other plaintiffs, however, had little reason to know that their right to recover for the flooding of their basements would hinge on the vagar-

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should not have been dismissed for failure to state a claim. See Pet. App. 11a-15a.

ies of admiralty law, including the Limitation of Vessel Owner's Liability Act.

More important, the State of Illinois has interests here in ensuring that land-based parties (such as Grubart), who have never engaged in maritime activities, receive adequate compensation for legal wrongs done them, and in defining the tort immunities that determine the magnitude of the legal exposure that local governments in Illinois (and their taxpayers) face. The legitimate state interest in controlling liability rules governing land-based parties is unquestionably substantial. Precisely for this reason, in *Victory Carriers, Inc. v. Law*, 404 U.S. 202 (1971), this Court warned that when an effort is made to extend admiralty jurisdiction to land-based injuries, the courts "should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Id.* at 212. State tort law should accordingly not be preempted by an exclusive federal remedy unless some federal interest justifies such a significant intrusion into the States' traditional prerogative to control the tort remedies available to land-based parties.

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court held that when an injury occurs on navigable waters and involves only parties engaged in maritime activities, federal jurisdiction is present if the incident giving rise to the injury poses a potential hazard to maritime commerce, and the activities giving rise to the incident have a substantial nexus to traditional maritime concerns. See *id.* at 363-64. The Court left open, however, the question what jurisdictional test should be used in a case involving parties not engaged in traditional maritime activities. See *id.* at 365 n.3. In this case, even assuming that Great Lakes was engaged in maritime activities, many of the City's activities (such as the actions it took to operate and repair the tunnel) were not traditional maritime activities, and certainly Grubart (a Loop shoe store) was not engaged in any maritime ac-

tivity. This case thus presents the issue that was reserved in *Sisson*.

In any case in which a party to a state-court tort action attempts to deprive another party of its state-law rights and remedies by invoking exclusive federal admiralty jurisdiction, the party invoking federal jurisdiction must establish at the outset that the case is one of "admiralty and maritime jurisdiction" within the meaning of the Constitution and the pertinent jurisdictional statutes. Even in cases of tortious injury occurring solely on navigable waters, and involving only parties engaged in maritime activities, this Court has insisted on a nexus to traditional maritime concerns before the case may properly be considered in "admiralty and maritime jurisdiction." Here, however, an even more serious question arises, precisely because Great Lakes seeks to preempt the state-law rights of land-based parties. When a case has both maritime and nonmaritime parties and elements, the threshold jurisdictional inquiry should be whether these land-based aspects of the case that ordinarily are governed by state law can be subjected to admiralty jurisdiction. If the land-based aspects of the case dwarf the significance of its maritime aspects, then surely the case should not be considered one of "admiralty and maritime jurisdiction."

In a case involving parties that were not engaged in maritime activities, *Sisson* does not provide the appropriate test. The *Sisson* test does not purport to consider the interests of parties not engaged in maritime activities or the interests of the States in adjudicating cases involving land-based injuries. In contexts where parties seek preemption of the state-law rights of others, the Court asks whether some federal interest justifies intruding upon matters otherwise properly left to state tort law. The same inquiry is appropriate here. To determine whether the case can be considered a maritime tort—thus importing into the case the specialized admiralty rules of decision—the Court should assess the competing federal and state interests at stake.

Under the inquiry we urge, this is not a case of federal admiralty jurisdiction. There is no evidence of congressional intent to extend admiralty jurisdiction to a case involving parties not engaged in maritime activities. And federal law does not regulate the type of pile driving Great Lakes performed. Preserving state-court jurisdiction would not subject Great Lakes to conflicting, nonuniform, or uncertain legal obligations. None of the parties to this case was actually involved in navigation, and thus none needs the protection of uniform federal rules. Great Lakes bid on a contract to do work at fixed locations from stationary—albeit floating—work platforms. That contract warned Great Lakes that its work could damage underground structures. It was always clear that Illinois law—and only Illinois law—would apply if there were state claims resulting from that work. Moreover, Great Lakes could have built into its bid price whatever risks such state-law liability might pose if it damaged land-based entities. In short, there is no federal interest sufficient to limit the state-law rights of plaintiffs, or the state-law defenses available to the City in Great Lakes' contribution and indemnity action, in order to protect the free flow of maritime commerce. Without such a federal interest, there can be no admiralty jurisdiction.

2. Even if this were a "case of admiralty and maritime jurisdiction" as the Court has construed that phrase, jurisdiction still requires a statutory basis. It is settled that the grant of admiralty jurisdiction to district courts found in 28 U.S.C. § 1333(1) does not reach cases involving damage on land caused by negligent conduct occurring on navigable waters. That is accomplished, if at all, by the Admiralty Extension Act, which provides that admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740. The court of appeals read this statute to permit the exercise of federal jurisdiction as long as plaintiffs' injuries were proximately caused by conduct occur-

ring on navigable waters. The flaw in this approach is identified by *Sisson* itself, which teaches that the jurisdictional inquiry should not be merged into the merits of proximate causation. See 497 U.S. at 365. Indeed, if the jurisdictional test were dependent on proximate causation, then presumably a federal court could not definitively assess its jurisdiction until after discovery and trial. And if a plaintiff failed to establish proximate causation, the justification for asserting federal jurisdiction over the action (and for preempting state-law remedies) would disappear at that time. To avoid such anomalous results, this Court has never permitted the existence of federal jurisdiction to turn on the merits of the underlying claim.

Instead of merging the inquiry concerning jurisdiction into the merits, this Court's cases suggest that a special rule of proximate causation should be applied under the Extension Act, to ensure that jurisdiction can be ascertained without fact-intensive inquiries. Such a rule also ensures that state law is not displaced without sufficient justification. Under this rule, federal courts should refuse to entertain claims of proximate causation under the Extension Act when the land-based injury occurs at a time and place remote from the alleged negligence occurring on navigable waters. See *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 210 (1963). If an injury is that remotely linked to negligence on navigable waters, then a claim of proximate causation is too fact-intensive and intrudes too substantially on matters traditionally left to state tort law. In such cases, the exercise of federal jurisdiction is unwarranted.

3. Even if the Court rejects the jurisdictional inquiry that we believe is necessary in a case such as this—involving land-based parties and injuries—and concludes that *Sisson* supplies the correct test for assessing federal jurisdiction, the Seventh Circuit erred in its application of that test. That court misapprehended the proper inquiry under *Sisson* by focussing on the alleged cause of the incident rather than on the general features of the incident itself.

As we explain above, *Sisson* rejected inquiry into causation at the jurisdictional stage. Thus, the incident for purposes of the *Sisson* inquiry is the injury for which recovery is sought—in this case, the flooding of basements in the Loop—and not its alleged underlying cause, which may or may not have been pile driving in navigable waters. The flooding of Loop buildings, of course, poses no potential hazard to maritime commerce, and thus cannot support the exercise of federal jurisdiction. Similarly, adherence to *Sisson*'s admonition against inquiry into causation requires the conclusion that the activity giving rise to the incident does not bear a substantial relationship to traditional maritime concerns. Again, there has been no finding—and Great Lakes hotly disputes—whether it had anything to do with the flooding of the tunnel. The activity that damaged the plaintiffs—regardless of its underlying cause—was the manner in which the tunnel was maintained. And the manner in which the City operated the tunnel has no nexus to maritime concerns, and affords no basis to convert this state tort action into one governed by exclusive federal jurisdiction.

ARGUMENT

I. THE TOTALITY OF CIRCUMSTANCES ESTABLISHES THAT THERE IS NO ADMIRALTY JURISDICTION IN THIS CASE.

The Constitution provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Congress has bestowed that power on the federal district courts in 28 U.S.C. § 1333, which provides in part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." The Admiralty Extension Act, in turn, provides that this "admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwith-

standing that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

Both Article III and these jurisdictional statutes refer to "admiralty and maritime jurisdiction," but neither the Constitution nor the statutes define what that phrase means. While the outer boundaries of an "admiralty or maritime" case are nowhere expressly stated, that does not mean that none exists. Plainly, at some point a case has so little relation to admiralty and maritime concerns that a court cannot fairly characterize it as an "admiralty and maritime" case within the meaning of the Constitution and the pertinent statutes.[3] Indeed, this Court held just that in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972), when it concluded that admiralty jurisdiction did not reach a case arising from an airplane crash into navigable waters because the case had no meaningful nexus to the traditional maritime concern for protecting water-borne commerce. See *id.* at 268-73.

The question how to define an admiralty case is of considerable practical importance as well, because it determines the rules of decision to be applied. Section 1333(1) grants exclusive jurisdiction to federal district courts over cases of "admiralty and maritime jurisdiction," and thus divests the state courts of the jurisdiction they would otherwise exercise, subject only to the "savings to suitors" clause.[4] Moreover, if a tort action is held to fall within

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[3] Indeed, the Court has observed that the Constitution limits Congress's ability to characterize a given controversy as a "case of admiralty and maritime jurisdiction":

> [T]here are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing clearly without.

Panama R. Co. v. Johnson, 264 U.S. 375, 386-87 (1924). See also, *e.g.*, *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959); *In re The Thomas Barlum*, 293 U.S. 21, 44 (1934); *Crowell v. Benson*, 285 U.S. 22, 55 (1932).

[4] The "savings to suitors" clause permits a state court to exercise jurisdiction over an in personam admiralty action as long as

federal admiralty and maritime jurisdiction, admiralty law will displace the operation of state law, since courts sitting in admiralty must apply federal rules of decision. See, *e.g., East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864 (1986); *Executive Jet*, 409 U.S. at 255. In particular, it has long been settled that once a case is characterized as arising from a tort on navigable waters, liability is to be determined under federal and not state rules of decision. *E.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628-29 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-10 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-46 (1942).

In *Sisson v. Ruby*, 497 U.S. 358 (1990), the Court held that a two-part nexus test for admiralty jurisdiction applies, in addition to the locality test, when recovery is sought for an injury occurring on navigable waters: whether the incident giving rise to the injury has a significant potential to disrupt commercial maritime activity and whether the activity giving rise to the incident bears a substantial relationship to traditional maritime concerns. See *id.* at 363-65. That test is sufficient in cases in which all parties are engaged in maritime activities. In such a case, the parties have fair notice that their activities may well be governed by federal law, and the interests of the States in regulating land-based activities are not implicated. Thus the jurisdictional issue is appropriately limited to whether the case has a nexus to the federal interest in protecting the free flow of maritime commerce.

When, as in this case, parties not engaged in traditional maritime activity are present—indeed where the claims

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it applies the substantive federal law of admiralty. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). The "savings to suitors" clause has limited application to this case, however, because Great Lakes has filed a petition under the Limitation Act, which provides that a vessel owner may petition a "district court of the United States of competent jurisdiction" for a limitation of liability, and once the owner has deposited security equal to the value of the vessel, the court must enjoin all other proceedings. See 46 U.S.C. App. §§ 183, 185; Fed. R. Civ. P. Supp. F.

arise from injuries occurring on land—a different question arises: whether admiralty jurisdiction can be extended to parties not engaged in maritime activities, who suffered land-based injuries, and whose legal rights are traditionally governed by state law. Indeed *Sisson* expressly left open the appropriate jurisdictional test in a case involving both maritime and nonmaritime parties: "Different issues may be raised by a case in which one of the instrumentalities is engaged in a traditional maritime activity, but the other is not. Our resolution of such issues awaits a case that squarely raises them." 497 U.S. at 365 n.3.

In cases presenting the question reserved in *Sisson*, the Court should not base its jurisdictional inquiry on whatever particular "activity" and "incident" may have occurred on navigable waters. An inquiry so confined gives no weight to the interests of land-based parties or to the interests of the States in adjudicating claims of land-based injury under state law. Instead, a court should assess the federal and state interests in adjudicating the underlying controversy to determine if there is a sufficient federal interest to justify displacing the state-law rules of liability by which land-based entities are ordinarily governed. That inquiry looks not merely at what occurred on navigable waters, but instead requires an examination of the totality of the circumstances (see *Kelly*, 485 F.2d at 525), and is compelled by the need to ensure that maritime interests are sufficiently strongly implicated that the case can properly be considered within the "admiralty and maritime jurisdiction."

A. Admiralty Jurisdiction Is Defined With Reference To The Federal Interest In Protecting Maritime Commerce.

Traditionally, admiralty jurisdiction over tort cases was confined to circumstances in which the wrong occurred on navigable waters. See *Executive Jet*, 409 U.S. at 253-54. Under this "locality" test, both the allegedly negligent conduct and its harmful effects must take place afloat; federal

jurisdiction did not extend to water-borne tortious conduct causing damage on land. *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865), contains the classic formulation of the locality rule: "the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction." *Id.* at 35.[5]

Dissatisfied with the results sometimes dictated by strict application of the locality test, the Court has moved to limit admiralty jurisdiction over tort cases that otherwise met the locality test but had no connection to traditional maritime activities. See *Executive Jet*, 409 U.S. at 255-56, 268. In *Executive Jet*, a commercial airplane, while taking off from Cleveland's airport, struck a flock of seagulls, causing the plane to crash in the waters of Lake Erie. The owners of the airplane brought suit against various defendants for allegedly having caused the crash, asserting jurisdiction under 28 U.S.C. § 1333(1). See 409 U.S. at 250-51. The Court held that a case growing out of an airplane crash on navigable water, although satisfying the locality test, is not a "maritime tort." *Id.* at 268. Rather, to be cognizable in admiralty, "the wrong [must] bear a significant relationship to traditional maritime activity." *Ibid.*

In determining whether the tort at issue had such a relationship to traditional maritime activity, the Court in *Executive Jet* examined the fundamental purpose of admiralty law and asked whether that purpose required the assertion of federal jurisdiction over the airplane crash. The Court concluded that because admiralty law was de-

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[5] See also *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 340 (1973); *Executive Jet*, 409 U.S. at 253-54; *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205-07 (1971); *Martin v. West*, 222 U.S. 191, 197 (1911); *The Troy*, 208 U.S. 321, 323 (1908); *Cleveland Terminal & Valley R. v. Cleveland S.S. Co.*, 208 U.S. 316, 319-20 (1908).

signed to accommodate the unique problems posed by vessels at sea, there was no nexus when a tort arose from an airplane crash. See 409 U.S. at 269-71. The Court also considered whether the state courts could deal satisfactorily with the issues presented by the airplane crash. See *id.* at 272-73. That Ohio courts "could plainly apply familiar concepts of Ohio tort law without any effect on maritime endeavors" (*id.* at 273) was another factor in determining that there was no admiralty jurisdiction over suits arising from the plane crash.

In *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), the Court made clear that this policy-based analysis of admiralty jurisdiction applied even to cases traditionally at the heart of admiralty jurisdiction—cases involving tortious injury allegedly resulting from the activities of a vessel plying navigable waters. *Foremost* arose out of a collision between two pleasure boats. The Court nevertheless refused to base jurisdiction solely on the commission of a tort occurring on a vessel on the water, holding that *Executive Jet*'s requirement of "a significant connection with traditional maritime activity" would apply in all cases. See 457 U.S. at 673-74 & n.4. In applying the nexus requirement to that case, the Court in *Foremost* again relied, as in *Executive Jet*, on the purpose of the substantive body of admiralty law. The Court rejected the argument that "traditional maritime activity" meant only vessels themselves engaged in commercial maritime activity, because operators of pleasure boats who do not comply with the uniform set of rules applicable to commercial vessels jeopardize maritime commerce. See *id.* at 674-75.

Most recently, the Court refined the nexus test in *Sisson v. Ruby*, 497 U.S. 358 (1990). *Sisson* arose from a fire caused by a defective washer/dryer on a pleasure boat docked in a marina; the fire spread to other vessels and the marina itself. The Court rejected the argument that any actionable conduct occurring on a vessel in navigable waters was an admiralty case:

> [T]he demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far. In *Foremost*, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction.

Sisson, 497 U.S. at 364 n.2 (emphasis in original). Instead, the Court formulated a nexus test that asks whether the incident giving rise to the injury has a significant potential to disrupt maritime commerce and whether the general characteristics of the activity giving rise to the incident bear a substantial relationship to traditional maritime activities. See *id.* at 363-65. The Court concluded that the nexus test was satisfied because a fire at a marina has a significant potential to disrupt maritime commerce, and the manner in which boats are stored at a marina has a substantial relationship to traditional maritime concerns. See 497 U.S. at 363-67.

This trilogy of cases, in particular, highlights the nature of the interest in asserting federal admiralty jurisdiction: protection of maritime commerce through uniform rules of decision. As vessels traverse navigable waters, they cannot be required to learn the differing local laws that might otherwise apply at each point in their journey, nor should they have to risk encountering vessels that may be unfamiliar with applicable local rules relating to navigational concerns. In *Executive Jet*, for example, the Court wrote that admiralty law is

> designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational rules—rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to

> determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.

409 U.S. at 269-70. In *Foremost*, the Court focussed on this same interest:

> The federal interest in protecting maritime commerce cannot be adequately served if admiralty jurisdiction is restricted to those individuals actually *engaged* in commercial maritime activity. This interest can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. . . . The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce.

457 U.S. at 674-75 (emphasis in original) (footnote omitted). Accord *Sisson*, 497 U.S. at 367 (rules governing storage of vessels on navigable waters must be uniform to protect maritime commerce).

The Court has identified this same federal interest—the need to protect maritime commerce through application of uniform federal rules of decision—in admiralty cases litigated in state courts under the "saving to suitors" clause of Section 1331(1). It is well settled that a state court sitting in admiralty may " 'adopt such remedies, and . . . attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law.' " *American Dredging Co. v. Miller*, 114 S. Ct. 981, 985 (1994) (quoting *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954), in turn quoting *Red*

Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924)). In determining what features of state law may permissibly be applied in admiralty cases the Court asks whether a state law rule " 'works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relationships.' " *American Dredging*, 114 S. Ct. at 985 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917)). Accord, *e.g.*, *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-40 (1961); *Davis v. Department of Labor & Industries*, 317 U.S. 249, 254 (1942). See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system" (footnote omitted)).

Thus, the need to protect maritime commerce through uniform federal rules of decision is the touchstone for determining the scope of federal jurisdiction. In a wide variety of cases involving only parties engaged in maritime activities, this federal interest amply justifies displacing state law. For example, if Great Lakes had negligently placed a piling in a navigable channel, where a vessel subsequently struck it and was damaged, the nexus to the federal interest in applying uniform rules that protect the free flow of maritime commerce would plainly be sufficient under *Sisson* to allow the exercise of federal jurisdiction. But as we note above, and indeed as the Court itself recognized, *Sisson* involved only parties engaged in maritime activities. See 497 U.S. at 365 n.3. In cases in which the interests of land-based parties are at stake, however, the federal interest in protecting maritime commerce will not always justify preempting the causes of action, and the defenses, otherwise available to land-based litigants under state law. As we now explain, the *Sisson* test does not help sort out these cases.

B. The *Sisson* Test Cannot Properly Determine Admiralty Jurisdiction In A Case In Which Not All Parties Are Engaged In Traditional Maritime Activity.

Even if we assume that the court of appeals correctly concluded that Great Lakes was engaged in traditional maritime activities, this case raises precisely the question left open in *Sisson*.[6] Many of the City's activities relevant to this case, such as its decisions about how to maintain, inspect, and repair the tunnel, were not traditionally maritime activities. And certainly Grubart, a Loop shoe store, was not engaged in any maritime activity.

The Court in *Sisson* was correct to reserve the question whether the two-part nexus test was appropriate for cases in which not all parties were engaged in maritime activities. The propriety of characterizing such a case as one of "admiralty and maritime jurisdiction" is open to serious doubt. The farthest inland that this Court has ever permitted admiralty jurisdiction to extend is to the portions of the shore that are hazards to navigation, such as bridges, or that are customarily used to service, load, and unload vessels. See generally *Victory Carriers*, 404 U.S. at 207-12; *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969). Thus there is no decision of this Court that supports the radical expansion of admiralty jurisdiction countenanced by the court of appeals.

There is also reason to doubt the fairness of such a radical expansion of admiralty jurisdiction landward. When parties have made an intentional decision to venture onto (or at least near) navigable waters and engage in maritime activities, they can fairly be held to the uniform federal rules of decision that have long governed there, at least when they cause injury on or near the water. Parties who make no such choice, however, have little, if any, opportunity to conform their conduct to the requirements of that law, or to obtain insurance or make

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[6] We do not, of course, agree with the Seventh Circuit's application of the *Sisson* test to this case. See Part III, *infra*.

other decisions about liability risks in light of the prevailing rules of admiralty. Hence the propriety of applying those rules to such parties is highly doubtful. Cf. *Wilburn Boat Co. v. Firemen's Fund Insurance Co.*, 348 U.S. 310, 316-21 (1955) (refusing to apply federal admiralty law to maritime insurance contracts, in part because the public has long acted on the assumption that state law governs marine insurance).

Here, plaintiffs in the consolidated state-court action seek recovery not for any injury occurring in navigable waters, but for flooding of building basements in downtown Chicago. They had little if any notice that federal rules of decision, such as the Limitation Act, would be applied to actions involving damage to their property, and thus little opportunity to purchase maritime insurance or otherwise make arrangements in light of these rules of federal law. The same is true of City officials who made decisions about how to maintain public property and insure against the risk of liability; they are ordinarily entitled to rely on the protections contained in the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS paras. 10/1-101 to 10-101 (1992).

The assertion of federal admiralty jurisdiction over this case will dramatically affect the rights of land-based parties not engaged in maritime activities that they would otherwise enjoy under state law. Plaintiffs seeking to recover against Great Lakes will confront its defense under the Limitation Act. And the City, in asserting its state-law tort immunity defenses, will confront the decision in *Workman v. Mayor of New York*, 179 U.S. 552 (1900), in which the Court refused to recognize state-law immunity defenses to a maritime tort in order to preserve the uniformity of federal admiralty law. Thus, characterizing flooding of building basements in the Loop as a maritime tort has serious implications for the legal rights of land-based parties.

Recognizing admiralty jurisdiction in cases involving land-based parties and activities also has serious federal-

ism implications. This Court has repeatedly recognized the States' legitimate and weighty interests in ensuring that plaintiffs receive adequate compensation for land-based injuries. See, *e.g.*, *English v. General Electric Co.*, 496 U.S. 72 (1990).[7] Conversely, the States also have a substantial interest in limiting plaintiffs' rights, should they decide to do so, by defining the scope of the tort liability to which local governments (and their taxpayers) are exposed. In Illinois, for example, state law affords immunity to local governments and their officials for decisions involving the exercise of judgment. This limitation on tort liability has been recognized in order to prevent undue supervision of public officials by the judiciary through the vehicle of tort litigation. See, *e.g.*, *Kennell v. Clayton Township*, 606 N.E.2d 812, 817-18 (Ill. App. 1992); *Fryman v. JMK/Skewer, Inc.*, 484 N.E.2d 909, 911-12 (Ill. App. 1985); *Williams v. Board of Education*, 367 N.E.2d 549, 555 (Ill. App. 1977).[8] This Court has itself acknowledged the importance of this governmental interest when construing the analogous tort immunity of

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[7] Indeed, the Court has acknowledged the legitimate interest of the States in adequately compensating their residents even in cases of maritime torts; it has held that state wrongful death and survival of actions statutes should be applied in admiralty when they do not alter the substantive law of admiralty or deprive a vessel owner of its defense under the Limitation Act. See *Just v. Chambers*, 312 U.S. 383, 387-92 (1941); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 241-42 (1921); *Old Dominion Steamship Co. v. Gilmore*, 207 U.S. 398, 405-06 (1907).

[8] *Fryman* considers the common-law limitations on the tort duties of local governments under Illinois law. *Kennell* and *Williams* construe section 2-201 of the Tort Immunity Act, which provides:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS para. 10/2-201 (1992). The City and the state-court class action plaintiffs like Grubart are currently litigating the applicability and scope of this and other state-law tort duties and immunities. *In re Chicago Flood Litigation*, No. 93-0207 (Ill. App. Ct.).

the United States provided by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2860(a). As the Court has written, that tort immunity "'prevent[s] "judicial second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" *United States v. Gaubert*, 499 U.S. 315, 323 (1991) (quoting *United States v. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984)).

Ordinarily, of course, in cases involving land-based injuries, state courts and legislatures enjoy the prerogative of balancing plaintiffs' interests in compensation against defendants' interest in some type of limitation on or immunity from tort liability. Sweeping such cases into federal admiralty jurisdiction, with its uniform federal rules of decision, accordingly has profound implications for the States because it deprives them of the power they otherwise would have to determine the liability rules governing land-based injuries.[9]

In short, once this case is characterized as within the admiralty jurisdiction of the district court, the rights and defenses of land-based parties become subject to federal statutory and common law doctrines, such as the Limitation Act and *Workman*—presumably the very reasons that Great Lakes has sought admiralty jurisdiction. And while federal courts may apply state-law rules of decision to supplement federal rules when they do not alter substantive federal admiralty law, see, *e.g.*, *Romero*, 358 U.S. at 373-74, leaving the accommodation of state inter-

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[9] As one commentator has noted:

> The question of the extent of the jurisdiction of the United States admiralty courts is important to the subject of federalism in maritime law for the obvious reason that a case that is not within the ambit of that jurisdiction is, ipso facto, not a potential source of the kind of federal-state jurisdictional conflict in question. Even more significant, however, is that fact that the ambit of the admiralty jurisdiction and the reach of applicability of the substantive maritime law are, in the large, coextensive.

David W. Robertson, *Admiralty and Federalism* 121 (1970).

ests to choice-of-law analysis is an entirely unsatisfactory solution, for at least two reasons.

First, any effort to preserve state-law rules of decision within admiralty jurisdiction "is constrained by a so-called 'reverse-*Erie*' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986) (referring to *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). And, as we explain at the outset of this discussion (see pp. 14-15, *supra*), once this case is characterized as a maritime tort within federal admiralty jurisdiction, liability is adjudicated under federal standards. In admiralty law, a determination that there is jurisdiction thus dictates the rules of decision and leaves little room to depart from the Limitation Act or *Workman*.

Second, whatever decisions there are to make within federal admiralty jurisdiction about the rules of decision will, of course, no longer be made by state courts and legislatures. It will be the federal courts that decide what, if any, state-law rules of decision to apply.[10] Thus in determining the rules of decision that will govern cases involving land-based parties and injuries, an impact on the interests of the States is inevitable, regardless of what choice-of-law decisions the federal courts ultimately make.[11]

The court of appeals relied on *Sisson* to reject any inquiry into the legitimate state interests compromised by an assertion of federal jurisdiction, or whether there was any federal interest in supplying uniform rules of decision was implicated here. The court held: "We believe that,

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[10] Even in cases tried in state courts under the "saving to suitors" clause, state courts will not be free to use state choice-of-law principles because of the "reverse *Erie*" doctrine requiring conformance to federal standards of liability.

[11] See generally Robertson, *supra* note 9, at 278 ("a sensible reworking of the jurisdictional scheme . . . would have important and salutary effect on the choice of law problem").

following *Sisson*, the jurisdictional inquiry must be much more rigidly structured than this. A court may not engage in the sort of policy analysis that apparently informed the district court's decision." Pet. App. 7a. This was error. The *Sisson* test cannot properly determine admiralty jurisdiction in cases in which not all parties are engaged in traditional maritime activities. In such cases, as the *Sisson* Court noted, the courts of appeals had employed the *Kelly* test (the same test used by the district court here). See 497 U.S. at 365-66 n.4. *Sisson* did not reject that test for cases involving nonmaritime parties; as we note above, the Court reserved decision on what test to use in such cases. See *id.* at 365 n.3. In *Sisson*, the Court held only that "at least in cases in which all of the relevant entities are engaged in similar types of activity (cf. n.3, *supra*), the formula initially suggested by *Executive Jet* and more fully refined in *Foremost* and in this case provides appropriate and sufficient guidance to the federal courts." *Id.* at 366 n.4.

Sisson should not be extended to cases involving nonmaritime parties because there is no place in the *Sisson* test for a consideration of the competing concerns raised when land-based claims are adjudicated in a federal admiralty court. The two nexus questions asked in *Sisson* accommodate neither the legitimate interests of land-based parties nor the federalism implications of resolving those parties' claims and defenses under federal admiralty law. That is understandable: the *Sisson* test was expressly crafted for cases involving only parties engaged in maritime activities arising from injuries occurring on navigable waters. But application of that test where only one party has engaged in activities on navigable waters that have a nexus to maritime concerns sets at nought the legitimate interests of nonmaritime parties, and of the States in controlling liability rules for nonmaritime parties. The appropriate jurisdictional test in cases in which not all parties are engaged in maritime activities must take into account the interests of nonmaritime parties and the legitimate interests of the States

in applying their common and statutory law to land-based parties and injuries as well.[12]

C. A Substantial Federal Interest In Protecting Maritime Commerce Is Required To Preempt The State-Law Rights Of Parties Not Engaged In Maritime Activities.

When the Court has considered whether to extend the reach of admiralty jurisdiction inland, it has examined the strength of the pertinent state interests to determine whether federal admiralty jurisdiction exists. In *Victory Carriers*, for example, a longshoreman was injured on a pier while driving a forklift to move cargo for eventual loading onto a ship. Rejecting an argument that the case fell within federal admiralty jurisdiction by virtue of Section 1333 and the Admiralty Extension Act, the Court wrote:

> We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish oppor-

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[12] As one commentator has written:

> The maritime nature of an occurrence does not deprive a state of its legitimate concern over matters affecting its residents or the conduct of persons within its borders; but the federal admiralty powers were granted to protect certain federal interests in maritime and commercial affairs. An issue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.

David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess"*, 1960 Sup. Ct. Rev. 158, 169; see also Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 257, 277 (1950) (noting that tortious injury by a maritime object to a non-maritime object creates difficult problems "not because of any metaphysical constructions as to tort 'locality' but because there is a legitimate state interest in the safety of property ashore.").

> tunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

404 U.S. at 211-12. Thus, the Court concluded:

> "The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined."

Id. at 212 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).[12]

The Court has also accommodated the legitimate state interest in adjudicating land-based claims when it has considered the related question whether the substantive law of admiralty preempts state regulatory statutes. In *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), for example, the Court held that admiralty law did not preempt a Florida statute governing liability for the costs of oil spills. See *id.* at 340-44. The Court

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[12] The result in *Victory Carriers*—that the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, did not apply to a longshoreman who was injured on land by land-based equipment while participating in loading a ship—has been legislatively overruled by the 1972 amendments to the Act. See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 260-64 (1977). Congress expanded the geographical coverage of the Longshoremen's Act landward by defining as part of "navigable waters" docks and other property customarily used to load and unload ships, but limited application of the Act to those engaged in maritime employment. See 33 U.S.C. §§ 902(3), 903. That legislation, however, did not alter the Admiralty Extension Act. *Victory Carriers* thus remains good law as a construction of the Extension Act and as a statement of the scope of admiralty jurisdiction. See *Askew*, 411 U.S. at 340-41 & n.11.

observed that "[h]istorically, damages to the shore or to shore facilities were not cognizable in admiralty" (*id.* at 340), and cited *Victory Carriers* for the proposition that admiralty jurisdiction should be extended inland only "with caution." *Id.* at 341. The Court found no federal interest in regulating these spills sufficient to overcome the weighty state interest in protecting its coast. See *id.* at 341-44.

Similarly, in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960), the Court held that state prosecutions against ships for violating a local smoke abatement ordinance were not preempted by federal admiralty jurisdiction because the legislation fell within traditional local police powers, and the Court could identify no federal interest in uniformity that justified preemption of this traditional local authority. See *id.* at 442-48. See also *Kelly v. Washington*, 302 U.S. 1, 13-15 (1937) (upholding state regulation of unsafe tugboats because it was an exercise of traditional police powers and there was no federal interest in imposing uniform rules).[14]

Thus the substantial state and local interests at stake when the admiralty jurisdiction and state-court jurisdiction collide are ones to which the Court has long been sensitive. Because the result of recognizing admiralty jurisdiction in this case is to displace plaintiffs' state-law rights and the City's state-law defenses, the need to balance federal and state interests is the same here as in other types of preemption cases. These concerns mandate a test for the assertion of admiralty jurisdiction when not all parties are engaged in maritime activity that properly takes account of those interests.

As the Court recognized in *Victory Carriers*, *Askew*, and *Huron Portland Cement*, liability rules for injuries

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[14] See generally *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S. 455, 461-67 (1886) (upholding state quarantine law applied to vessels arriving in port); *Packet Co. v. Catlettsburg*, 105 U.S. 559, 561-65 (1881) (upholding local regulation of steamboat landings).

occurring on land have traditionally been set by state tort law. When the Court considers preemption in non-admiralty cases in the absence of express congressional guidance or occupation of an entire regulatory field,[15] the Court has presumed that there should be no preemption in areas traditionally governed by state and local law, and has permitted preemption only if there is a " 'clear and manifest' " federal interest in supplanting state law sufficient to overcome that presumption. *English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). See also, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-19 (1992); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255-56 (1984). Such a federal interest is present only when "it is impossible for a private party to comply with both state and federal requirements . . . or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *English*, 496 U.S. at 79 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The same balancing of federal and state interests is called for here. Indeed, such a balance of interests is compelled by this Court's admiralty decisions as well, which repeatedly counsel that the jurisdictional inquiry cannot be divorced from the purposes that support the exercise of jurisdiction. See *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2076 (1991); *Sisson*, 497 U.S. at 364 n.2.[16]

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[15] Here, as we explain above, neither a statute nor the Constitution defines the phrase "admiralty and maritime jurisdiction," and this Court's admiralty preemption cases such as *Victory Carriers*, *Askew*, *Huron Portland Cement*, and the others we cite above make clear that Congress has not occupied the field of wrongful conduct occurring on navigable waters.

[16] See also *American Dredging*, 114 S. Ct. at 990 (Souter, J., concurring) ("how a given rule is characterized for purposes of determining whether federal law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce"); *id.* at 992 (Stevens, J. concurring in part and concurring in the judgment) (arguing that admiralty preemption should be measured by the

Accordingly, when an effort is made to extend admiralty jurisdiction to parties and activities that have traditionally been governed by state law, the inquiry should not be governed by *Sisson*. Rather, in cases involving land-based parties and injuries, a federal court should satisfy itself that the totality of the circumstances reflects a federal interest in protecting maritime commerce sufficiently weighty to justify shifting what would otherwise be state-court litigation into federal court under the federal law of admiralty. This inquiry is faithful to admiralty law's purpose—to protect maritime commerce—while at the same time taking account of the competing federal and state interests in adjudicating claims involving both maritime and nonmaritime parties, activities, and injuries.[17]

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same preemption principles "as in cases involving nonmaritime subjects"); *id.* at 995 (Kennedy, J., dissenting) (arguing that admiralty preemption should be measured by the federal interest in promoting "comity and trade. The States are not free to undermine these goals . . . .").

[17] Our analysis is substantially the same as that of the four dissenters in *Foremost* and as the *Kelly* test used by the district court. Of course, *Foremost* involved only parties engaged in maritime activities on navigable waters, and the majority rejected the test for that reason. See 457 U.S. at 674-75. The *Kelly* test, as we explain above, looks to the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. See *Kelly*, 485 F.2d at 525. While we have endeavored to formulate the test with somewhat more precision than *Kelly* did, that test as well looks to the totality of the circumstances to determine whether the federal interest in applying uniform rules of decision is implicated by the case. See, *e.g.*, *Whitcombe v. Stevedoring Services of America*, 2 F.3d 312, 315 (9th Cir. 1993); *Sinclair v. Soniform, Inc.*, 935 F.2d 599, 602 (3d Cir. 1991); *Cochran v. E.I. duPont de Nemours*, 933 F.2d 1533, 1538 (11th Cir. 1991), cert. denied, 112 S. Ct. 881 (1992); *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 440 (5th Cir. 1991). The district court, when it applied the *Kelly* test, correctly took account of the totality of the circumstances and concluded that there was no sufficient federal interest to justify an exercise of admiralty jurisdiction in this case. See Pet. App. 32a-33a, 37a-38a. Indeed, it was precisely this aspect of the district court's analysis to which the court of appeals objected. See Pet. App. 7a.

D. The Federal Interest In Adjudicating This Controversy Is Insufficient To Justify Adjudicating The Rights Of Land-Based Litigants In Federal Court.

The presence of land-based parties, activities, and injuries in this case means that it has a substantial nonmaritime element over which Great Lakes seeks to have a federal admiralty court assert jurisdiction. As we explain above, because parties not engaged in maritime activities, as well as claims arising from land-based injuries, are traditionally governed by state law, federal jurisdiction must be based on a showing that there is a federal interest in protecting maritime commerce present. Or, to state the point in the terms that the Court has used in its preemption jurisprudence, preserving state-court jurisdiction must "stand[] as an obstacle" to achieving the federal interest in protecting maritime commerce. See *English*, 496 U.S. at 79. As applied to this case, that inquiry involves three particular questions—first, whether there is any evidence of congressional intent to assert a federal interest in federal adjudication of this type of case; second, whether there is a risk that Great Lakes will be subject to conflicting, nonuniform, or uncertain obligations if state jurisdiction is not displaced; and third, whether state-court jurisdiction will otherwise burden maritime commerce.

1. There is no evidence of congressional intent to bring this type of case within federal jurisdiction. As we note above, neither Section 1333(1) nor the Admiralty Extension Act defines a "case of admiralty and maritime jurisdiction," so there is no express congressional determination that controversies involving parties not engaged in maritime activities should be resolved in federal court.[18]

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[18] The Admiralty Extension Act merely extends "admiralty and maritime jurisdiction," whatever that is, to certain land-based injuries. The Act does not define what types of actions should be considered cases of "admiralty and maritime jurisdiction" in the first instance. Rather, it means only that if a case otherwise falls within "admiralty and maritime jurisdiction," the exercise of federal jurisdiction will not be defeated solely because the injury occurs on part of the shore that is traditionally considered part

Nor do Great Lakes' activities relevant to this case fall within any area in which Congress has legislated. The conduct, for example, is not related to navigational concerns, such as those embodied in the Rules of the Road, 33 U.S.C. §§ 2001-73. Indeed, we are aware of no federal statute or regulation providing standards for the pile driving that Great Lakes here performed—in particular, no federal rules govern how to drive or replace pilings so that underground structures are protected.[19]

2. An assertion of federal jurisdiction is unnecessary to protect Great Lakes from conflicting, nonuniform, or uncertain obligations. There is no risk at all that state and federal law will subject Great Lakes to conflicting obligations if state-court jurisdiction is preserved. Either federal or state jurisdiction, but not both, will ultimately be upheld; and, in this case, whichever court takes the matter will apply its own law. Thus, if there is no federal jurisdiction, the federal common law of admiralty will impose no obligations on Great Lakes. Nor does any other aspect of federal law impose obligations on Great Lakes. Again, we are not aware of any statute or regulation that addresses the work Great Lakes performed or the tort it allegedly committed. With no evidence that the federal government actually regulates its conduct under the contract at issue, Great Lakes is poorly positioned to argue that state and federal law subject it to conflicting obligations. Cf. *Davis*, 317 U.S. at 256-58 (refusing to find federal preemption of state workers' compensation law for employee drowned when he fell from barge, in part be-

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of land—such as a pier, dock, or bridge. See, *e.g.*, *Victory Carriers*, 404 U.S. at 209-12 & n.8. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-23 (1969); *Rodrigue*, 395 U.S. at 356. We discuss the language and purpose of the Extension Act in greater detail in Part II below.

[19] The City informed the United States Coast Guard of the piling replacement project at issue. That agency advised that the City would need a federal permit only if it employed steel rather than timber pilings. The City chose timber pilings and was subject to no further federal review or permit requirements. J.A. 46.

cause federal law did not appear to regulate his employer); *Kelly v. Washington*, 302 U.S. at 13-14 (refusing to find state tugboat regulation preempted, in part because no federal regulation of tugboats existed).

Nor does Great Lakes need access to federal court to protect it from a risk that its conduct would be governed by nonuniform state liability regimes. As we explain above, the need for uniform rules for seaworthiness, navigation, and the activities that can affect them is the federal interest that traditionally justifies the assertion of admiralty jurisdiction. The federal interest is thus at its nadir when these activities are not involved. Here, these concerns are not in fact involved. Great Lakes' pile driving did not call into question the seaworthiness of its barges. Nor did Great Lakes' pile driving implicate navigational concerns: Great Lakes' admiralty petition does not seek exoneration or limitation with respect to any claim that its allegedly wrongful conduct on navigable waters obstructed navigation. The contract, moreover, required Great Lakes to replace pilings in precisely the same location as they had been in, locations that had proved over the years not to interfere with navigation. State courts adjudicating this case thus need evaluate only Great Lakes' care with respect to underground structures, and not its compliance with rules governing navigation or seaworthiness. Cf. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 421-23 (1985) (injury to worker on oil drilling platform in navigable waters does not fall within admiralty jurisdiction because platforms were not involved in navigation and "were not even suggestive of traditional maritime affairs"); *Rodrigue*, 395 U.S. at 360-61 (oil drilling platforms are not within admiralty since "[t]hey were islands, albeit artificial ones"). The court of appeals certainly identified no need for or federal interest in supplying a uniform federal rule to guide the use of stationary platforms to perform pile driving to replace pilings in the same exact location. In fact there is no federal interest. Only the City, its Loop residents and businesses, and its taxpayers had an interest in what Great Lakes did and how it did it.

There is also no danger of varying state and local rules governing Great Lakes' pile driving. Here, the contract required pile driving in one identified, stationary location—the Chicago River. Great Lakes, in carrying out its pile-driving contract, operated its "vessels . . . as fixed platforms . . . not involved in navigation." Pet. App. 37a. There thus was never any possibility that Great Lakes' pile driving would fall under more than one regime of law administered by different state courts. Grubart and other plaintiffs did not have their choice among state courts; Great Lakes was not at risk that plaintiffs could successfully forum-shop.

Finally, the assertion of state-court jurisdiction in this case will not subject Great Lakes to uncertain obligations or otherwise undermine the federal interest in protecting maritime commerce through readily ascertainable rules of decision. Great Lakes performed pile-driving services for the City pursuant to a contract that required it to place pilings at fixed locations in the Chicago River and warned of the possible presence of underground structures. In determining the degree of care to exercise in performing the pile driving, Great Lakes could easily ascertain Illinois law on liability for damaging underground structures. In contrast, no federal standards relating to such structures exist. Thus, Great Lakes knew precisely what it was to do, at precisely which locations, and could readily identify the State's law that would apply and what that law was.

3. Preservation of state-court jurisdiction would not otherwise burden maritime commerce. As we have just explained, the pile-driving activities here did not implicate navigational concerns or whether Great Lakes' barges were seaworthy according to maritime custom. As we note above, Great Lakes' admiralty petition does not seek exoneration or limitation on any claim that its conduct obstructed navigation or otherwise presented a hazard to maritime commerce or those engaged in maritime activities. Rather, Great Lakes has sought to limit its liability (and the City's state-law defenses) with respect to land-based injuries. Because none of the parties was actually

involved in navigation, the federal interest in supplying uniform rules of decision to ensure that maritime commerce is unimpeded is not present. Cf. *Executive Jet*, 409 U.S. at 268-72 (airplane crash did not fall within admiralty jurisdiction because airplanes are not engaged in maritime navigation and thus have no nexus to maritime concerns); *Rodrigue*, 395 U.S. at 360-61 (oil drilling platform was not involved in navigation and hence did not fall within admiralty jurisdiction).

Moreover, the burden of state liability rules will not fall on pile-driving contractors such as Great Lakes even if their conduct is adjudicated by state courts. Great Lakes was on notice not only of the precise locations where it was to perform its work, but also of the existence of nearby underground structures. Great Lakes could readily (and presumably did) protect itself against whatever risks state tort law might present by adjusting its bid price, purchasing insurance, demanding indemnification, or making similar arrangements. Thus, Great Lakes could have passed on to the City whatever risks state-supplied rules of liability imposed. For this reason, Great Lakes has no need for the protection of federal rules of decision to avoid the economic burdens that state law imposes for any land-based damages that it caused. Federal admiralty law should not step in after the fact to provide Great Lakes with the protection it could have secured for itself.

In short, requiring Great Lakes to defend itself in state court against parties who suffered land-based injuries poses no threat of impeding the flow of maritime commerce. State courts can assess Great Lakes' liability for land-based injuries "without any effect on maritime endeavors." *Executive Jet*, 409 U.S. at 273. There is, in particular, no federal interest in providing uniform rules to govern the standard of care for Great Lakes' pile-driving activity —especially as it relates to underground structures—and that is the federal interest on which admiralty jurisdiction is founded. On the other hand, there is a strong interest in allowing the plaintiffs and the City to rely on the

rights, liabilities, and defenses, afforded under Illinois tort law. A case involving liability for the flooding of basements in the Chicago Loop is not a federal admiralty case.[20]

II. THE ADMIRALTY EXTENSION ACT DOES NOT CONFER ADMIRALTY JURISDICTION OVER THIS CASE.

Even if this were a case of "admiralty and maritime jurisdiction" as the Court has construed that phrase, some statute must still be identified that confers jurisdiction on the district court. It is quite clear that 28 U.S.C. § 1333(1) is not such a statute. As we explain above, Section 1333(1) has never extended admiralty jurisdiction to damage caused on land. To be within the scope of Section 1333(1), standing alone, the tortious injury complained of has to occur on navigable waters. Under Section 1333(1), "[t]he Court [has] refused to permit recovery in admiralty even where a ship or its gear, through collision or otherwise, caused damage to persons ashore or to bridges, docks, or other shore-based property." *Victory Carriers*, 404 U.S. at 209. See also *Executive Jet*, 409 U.S. at 253-55.

Here, because the injuries complained of are land-based, Section 1333(1) standing alone does not reach this case. Thus, if a district court is to exercise "admiralty and maritime jurisdiction" over this case, it must be by virtue of the Admiralty Extension Act, which provides that "admiralty and maritime jurisdiction . . . shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstand-

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[20] Of course, there will be cases when the federal interest is sufficiently weighty to justify the exercise of federal jurisdiction over claims arising from land-based injuries. For example, if one of Great Lakes' tugboats had struck a City bridge, damaging one of Grubart's trucks then on the bridge, the claims of Grubart and the City against Great Lakes—although arising from land-based injuries to nonmaritime parties—would fall within admiralty jurisdiction because of the strong federal interest in supplying the body of law that governs vessels engaged in navigation.

ing that such damage or injury be done or consummated on land." 46 U.S.C. App. § 740.

The court of appeals thought that as long as the plaintiffs' injuries were proximately caused by Great Lakes' alleged negligence, the Extension Act supplied federal jurisdiction here. See Pet. App. 8a-9a. But *Sisson* holds that jurisdictional statutes should not be read to collapse a federal court's jurisdictional inquiry into the merits of proximate causation: "Were courts required to focus more particularly on the causes of the harm, they would have to decide to some extent the merits of the causation issue to answer the legally and analytically antecedent jurisdictional question." 497 U.S. at 365. This holding is sound. Merging a federal court's jurisdictional inquiry into the merits creates serious practical problems. If a court cannot decide whether it has jurisdiction until it decides the question of proximate causation, then it cannot determine whether it has jurisdiction over the matter until after discovery and trial. And then, if the trier of fact rejects proximate causation, the justification for exercising federal jurisdiction, and, in turn, for preempting state tort remedies and trying the case in federal court, disappears.

Thus, jurisdictional statutes should not be construed in a manner that makes jurisdiction turn on the merits of proximate cause. This case illustrates the paradox involved in trying to resolve the merits of the causation issue in order to determine the jurisdictional issue. Great Lakes' complaint lays claim to admiralty jurisdiction on the ground that it has been sued by parties that allege that it caused the flooding of the Loop and the injuries complained of there. J.A. 33-35. At the same time, however, Great Lakes alleges that, on the merits, it was blameless for the flood and that the City is solely responsible for causing plaintiffs' damages. J.A. 34. And if Great Lakes proves just that at trial, then there will be no basis for exercising federal jurisdiction over this case under the Extension Act, for Great Lakes will have disproved the existence of any federal interest in asserting

jurisdiction over this case and shifting litigation over proximate causation—and all other issues—from state to federal court.

Sisson is not the only occasion on which this Court has disapproved of merging the jurisdictional inquiry with the merits. The seminal case on this point is *Bell v. Hood*, 327 U.S. 678 (1946). There the Court refused to hold that a district court lacked federal question jurisdiction over a complaint because it might not state a claim on the merits: "Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy." *Id.* at 682. Thus the rule has emerged in federal question cases that as long as a complaint is not wholly frivolous on its face, it is sufficient to confer jurisdiction under 28 U.S.C. § 1331. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 768 (1993); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978); *Hagans v. Lavine*, 415 U.S. 528, 542 n.10 (1974); *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); *Romero*, 358 U.S. at 359; *Bell v. Hood*, 327 U.S. at 682-83.

Theoretically, the Extension Act could be read in the same way that *Bell v. Hood* read Section 1331: admiralty jurisdiction could be recognized in every case in which a nonfrivolous claim of proximate causation is asserted, even if the claim later proves unfounded. Although possible, such a rule should be rejected because it would have very different consequences in the context of admiralty jurisdiction than in the context of federal question jurisdiction. Recognizing federal question jurisdiction does not preempt any state-law rights otherwise available to the parties—Section 1331 supplements rather than replaces the state tort law. See, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 183 (1961). By contrast, assertion of federal admiralty jurisdiction deprives parties of their state-law rights. Admiralty jurisdiction, therefore, should not be based on a claim of proximate causation that, al-

though nonfrivolous, may well prove insubstantial. As we explain above, this Court, in assessing federal admiralty jurisdiction, has long been sensitive to the serious federalism implication of such preemption.

In particular, in *Victory Carriers*, the Court refused to construe the Extension Act to confer admiralty jurisdiction over a suit by a longshoreman injured on a pier while moving cargo to be loaded on a ship. "[S]tate law has traditionally governed accidents like this one" where the longshoreman was injured on land. 404 U.S. at 212. A broad construction of the Extension Act "would raise difficult questions concerning the extent to which state law would be displaced or pre-empted, and would furnish opportunity for circumventing state workmen's compensation statutes." *Ibid.* Thus, the Court recognized that it "should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts." *Ibid.* See also *Askew*, 411 U.S. at 340-44 (holding that the Extension Act did not preempt Florida law governing liability for oil spills because this would invade traditional state police powers). Here, similar federalism problems would arise if nonfrivolous but ultimately insubstantial claims were to enable state-court defendants such as Great Lakes to circumvent state-law tort liability rules.

Moreover, to permit federal courts to exercise admiralty jurisdiction based only on a nonfrivolous claim of proximate causation—thereby moving litigation over proximate causation and all other aspects of the merits from state to federal courts without a finding by the trier of fact that jurisdiction in fact exists under the Extension Act—could well exceed Congress's authority to displace state tort law. In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court held that the Longshoremen's and Harbor Workers' Compensation Act could not constitutionally apply to an employee absent a finding that he was injured on navigable waters; without such a finding, Congress lacked the constitutional power to transform the liability proceeding into a federal case in admiralty. See

id. at 54-56.[21] Under *Crowell*, a construction of the Extension Act that would permit the assertion of federal jurisdiction based solely on a nonfrivolous claim of proximate causation—without a finding that the land-based injury was actually caused by conduct occurring on navigable waters—would raise serious constitutional questions. And *Crowell* also teaches that jurisdictional statutes should be construed to avoid raising these constitutional problems. See *id.* at 62-63.

Finally, permitting extension of admiralty jurisdiction to land-based injuries simply because the claim that they are linked to conduct occurring on navigable waters is not wholly frivolous would create myriad practical problems. Parties seeking to take advantage of more favorable admiralty rules of decision would doubtless construct increasingly more bizarre theories of causation, presenting federal courts with new legal quagmires as they try to determine how unlikely a claim of causation must be before it is frivolous. In addition, as each claim was sustained, parties would become emboldened to march ever farther inland with their so-called admiralty cases. Accordingly, "[a]ffirmance of the decision below would raise a host of new problems as to the standards for and limitations on the applicability of maritime law to accidents on land." *Victory Carriers*, 404 U.S. at 214 (footnote omitted).

Instead, a construction of the Extension Act is required that avoids both the problems inherent in merging the jurisdictional inquiry into the merits of proximate causation and the equally serious problems inherent in permitting the assumption of federal jurisdiction based merely on a nonfrivolous claim of proximate causation. The Court's decision in *Gutierrez v. Waterman Steamship*

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[21] While statements in *Crowell* concerning the right to trial de novo on an administrative agency's findings of jurisdictional fact have fallen into disrepute, its holding concerning the constitutionally permissible scope of federal admiralty jurisdiction continues to be treated as good law. See, *e.g.*, *United States v. Raddatz*, 447 U.S. 667, 682-83 & n.9 (1980).

Corp., 373 U.S. 206 (1963), suggests the appropriate test. There the Court concluded that admiralty jurisdiction was properly invoked pursuant to the Extension Act over the claim of a longshoreman who slipped on beans that had spilled on the dock while the vessel was being unloaded in navigable waters. The Court held:

> We think it sufficient for the needs of this occasion to hold that the case is within the maritime jurisdiction under 46 U.S.C. § 740 when, as here, it is alleged that the shipowner commits a tort while or before the ship is being unloaded, and *the impact of which is felt ashore at a time and place not remote from the wrongful act.*

Id. at 210 (emphasis supplied) (footnote omitted). Under this construction of the Extension Act, there is a special rule that precludes jurisdiction in cases raising close questions of the proximate causation of injuries that are remote from conduct occurring on navigable waters. The remoteness rule provides a jurisdictional test that does not depend on fact-intensive inquiries that can be made only after discovery and trial, or on claims of causation that may well prove to be ultimately meritless.

The construction of the Extension Act embraced in *Gutierrez* is plainly correct. The statutory text nowhere defines what types of claims of causation will be sufficient to fall within the Act, nor does it define how close the relationship must be between activity on navigable waters and a land-based injury to make the case one of "admiralty and maritime jurisdiction." The Act's purpose, however, makes clear that only a modest expansion of jurisdiction was intended. As this Court explained in *Victory Carriers,* the Act was intended to repudiate the result of cases holding that admiralty jurisdiction did not provide a remedy for damage done by ships on navigable waters to structures on the shore. See *Victory Carriers,* 404 U.S. at 209 & n.8. See also *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 221-23 (1969); *Rodrigue*, 395 U.S. at 360; S. Rep. No. 1593, 80th Cong., 2d Sess. 2

(1948); H.R. Rep. No. 1523, 80th Cong., 2d Sess. 2 (1948).[22] Thus we think it significant, and appropriate, that *Gutierrez* described the Extension Act as reaching cases of injuries "ashore," and not "inland." Even then, jurisdiction is limited to injuries occurring "at a time and place not remote from the wrongful act." 373 U.S. at 210.

The court of appeals rejected our argument that the land-based injuries in this case were too remote in time and place from any wrongful act on navigable waters, ironically because it construed this Court's holding in *Gutierrez* as "nothing more than a specialized rule of proximate causation." Pet. App. 8a. But the court of appeals then did not apply a "specialized rule"; rather, it held that there was federal jurisdiction as long as the plaintiffs' injuries were alleged to have been caused by conduct occurring on navigable waters. There is nothing "specialized" about such an inquiry; indeed it is the same inquiry as in any case in which proximate causation is an element. Thus, the decision below converts this aspect of *Gutierrez* into a dead letter. And there is a valuable role for the *Gutierrez* rule: it avoids invoking federal jurisdiction in cases in which the merits of proximate causation are likely to raise difficult and fact-intensive issues.

Accordingly, claims of proximate causation under the Admiralty Extension Act should be rejected as insufficient

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[22] There is no indication in this legislative history of Congress' intent to extend admiralty jurisdiction to cover nonmaritime parties injured on land by a chain of events ultimately traceable to an accident on water. Moreover, there is no indication that the two organizations principally advocating adoption of the Act, the American Bar Association and the Maritime Law Association of the United States, contemplated that the Act would reach so far. See Lawrence Bogle, *et al.*, *Report of the Committee on Admiralty and Maritime Law*, 60 Rep. A.B.A. 411-14 (1935); Charles Hickox, *et al.*, *Report of the Committee on Admiralty and Maritime Law*, 56 Rep. A.B.A. 311-15 (1931); T. Catesby Jones, *et al.*, *Report of the Committee on Admiralty and Maritime Law*, 55 Rep. A.B.A. 303-13 (1930). See also Proc. Mar. L. Ass'n, doc. no. 234 at 2455-59 (1937); Proc. Mar. L. Ass'n, doc. no 225 at 2339 (1936).

when it cannot confidently be said that the land-based injury occurs "at a time and place not remote from the wrongful act" on navigable waters. In our view, a claim will be remote when the land-based injury does not occur reasonably contemporaneously with negligent conduct occurring on navigable waters and when the injury occurs at a place farther from navigable waters than the reach of the vessel, its appurtenances, and cargo. This test is manageable and appropriately respectful of both the federal and state interests involved.

Applying that test to this case, it is plain that the damage complained of here—the flooding of buildings in the Loop more than six months after the completion of the alleged maritime activity—falls outside the reach of the Admiralty Extension Act. *Victory Carriers* held that even the injuries suffered by a longshoreman while driving cargo to a point at which it was to be loaded onto a vessel, caused by the alleged unseaworthiness of the vessel and the negligence of its owner, were too remote to be within the Extension Act. See 404 U.S. at 211-14. Here the impact of Great Lakes' activities was felt inland at a time and place far more remote from any act in navigable waters. This type of claim of proximate causation accordingly supplies an insufficient basis to warrant the exercise of admiralty jurisdiction.

III. THERE IS NO ADMIRALTY JURISDICTION IN THIS CASE UNDER THE *SISSON* TEST.

If this Court rejects our argument that the *Sisson* test should not be used to determine whether there is admiralty jurisdiction in this case, the Seventh Circuit's application of the *Sisson* rule should still be reversed. Even a straightforward application of the jurisdictional test set forth in *Sisson* establishes that there is no admiralty jurisdiction over this case. Although purporting to apply the *Sisson* test, the court of appeals actually distorted it in fundamental ways. The Seventh Circuit's exclusive focus on Great Lakes' pile-driving activities—and its refusal to consider the land-based aspects of the case—was not faithful

to *Sisson*'s admonition that a court should not identify the underlying cause of a maritime tort in order to determine whether federal jurisdiction exists.

The test announced in *Sisson* requires consideration of (1) whether "the general features of the type of incident involved [make the] incident . . . likely to disrupt commercial [maritime] activity" (see 497 U.S. at 363), and (2) whether "the activity giving rise to the incident" bears a "substantial relationship" to "traditional maritime activity" (see *id.* at 364). With regard to the first part of the *Sisson* test—"the general features of the type of incident involved"—this Court in *Sisson* described the incident as "a fire that began on a noncommercial vessel at a marina located on a navigable waterway." *Id.* at 362. The Court wrote that a federal court should look not to the underlying cause of the incident, but rather only at characteristics of the incident itself—the particular event that tortiously damaged the plaintiff. The jurisdictional inquiry should not "turn on the particular facts of the incident in this case, such as the source of the fire." *Id.* at 363. Instead, the incident was what actually caused tortious damage to property—in that case, "a fire on a vessel docked at a marina on navigable waters." *Ibid.* The court concluded that is the type of incident likely to disrupt commercial maritime activity. See *ibid.*

Here, the tortious injury of which the plaintiffs complain—and which Great Lakes argues is cognizable only in a federal admiralty court—is water damage to their basements. Under *Sisson*, that is the "incident" relevant to the jurisdictional analysis. But the flooding of downtown basements hardly poses a likelihood of disrupting maritime commerce.

The Seventh Circuit went astray because it attempted to identify not the "incident," but "the incident giving rise to the alleged wrong." Pet. App. 6a. Thus, the court focussed on the cause of the incident and not the incident itself. This distinction is crucial. In this case, it is the difference between the allegedly tortious flooding of land

and the cause of that flooding, which the court below identified as "the installation of pilings from barges." Pet. App. 9a. *Sisson* explicitly rejects any consideration of the cause of the incident. See 497 U.S. at 363. Thus, the "general features of type of incident involved" in this case—determined by reference to the tortious injury to the plaintiffs, rather than its cause—can only be accurately identified as the flooding of building basements in a downtown business district.[23]

The error of the court of appeals' approach is easily seen by reference to *Sisson* itself. Under the Seventh Circuit's test, the Court in *Sisson* would have been concerned with the cause of the fire, not the fire itself. But as we explain above, the *Sisson* Court rejected inquiry into the underlying cause of the fire. Indeed, under the Seventh Circuit's test, *Sisson* would have come out the other way; this Court would not likely have concluded that the cause of the fire—a defective washer/dryer unit—posed a potential hazard to commercial maritime activity. This shift in focus by the court below also skews the outcome in this case: the installation of pilings from barges has the potential to disrupt maritime commerce; the flooding of building basements plainly does not.

The court of appeals observed that efforts to repair the tunnel breach had resulted in a month-long closing of the Chicago River, which in turn disrupted maritime commerce. See Pet. App. 10a. But that was not the "incident" that damaged these plaintiffs. If Great Lakes had been sued by vessel owners unable to move in maritime commerce because of its alleged negligence, the court of appeals' characterization of the "incident" might be correct. But this case involves only flooding of land-based property. That incident poses no likelihood of disrupting maritime commerce.

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[23] Indeed, the court below seemed to recognize that the incident was the flooding when, in discussing the second prong of *Sisson*, it attempted to ascertain "Great Lakes' activity at the time it allegedly caused, or precipitated the flood. . . ." Pet. App. 10a.

With regard to the second part of the *Sisson* test—whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity—*Sisson* teaches "that the relevant 'activity' is defined not by the particular circumstances of the incident, but by the general conduct from which the incident arose." 497 U.S. at 364. The Court again disclaimed inquiry into causation, writing that it "need not ascertain the precise cause of the fire to determine what 'activity' Sisson was engaged in; rather, the relevant activity was the storage and maintenance of a vessel at a marina on navigable waters." *Id.* at 365. Thus, it is the activity that tortiously damaged the plaintiffs, and not its "precise cause," that is relevant under *Sisson*.

On this prong as well, the court of appeals erred. The court identified "Great Lakes' activity at the time it allegedly caused, or precipitated, the flood as . . . the sinking of pilings into a riverbed," and held that this activity was substantially related to traditional maritime activity. Pet. App. 10a. Again, however, the Seventh Circuit's focus on the pile driving incorrectly embroiled the court in questions of causation. We do not yet know in this case what caused the flooding of the tunnel. Great Lakes, of course, denies that its conduct was in any way the cause. J.A. 34, 37, 39. Thus, rather than embark on the speculative inquiry what conduct caused the flooding of the tunnel, the court should have focussed on what allowed the water from the tunnel to enter plaintiffs' property. This, after all, was the tort of which plaintiffs complain—the flooding of their property. The activity that gave rise to the flooding of plaintiffs' property from the flooded tunnel was the manner in which the tunnel had been operated and maintained. Indeed, the failure to repair the tunnel is the precise reason why water reached plaintiffs' property.[24] And the manner in which

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[24] Great Lakes itself has framed this case to focus on land-based activities. Its admiralty petition alleges that the City is solely responsible for the flood and all of the damage that resulted. See J.A. 34, 38-39. Great Lakes' account of this case—that all plain-

the City monitored, evaluated, and maintained the tunnel has no substantial nexus to traditional maritime concerns.[25]

As with the first nexus prong, reference to *Sisson* makes the court of appeals' error readily apparent. Under the Seventh Circuit's narrow vision, the activity giving rise to the incident in *Sisson*—the fire—would have been the first negligent act that ultimately resulted in the tortious incident—the installation of a defective washer/dryer unit on a pleasure boat. But in holding that the relevant activity was the storage and maintenance of the vessel at the marina, this Court specifically rejected an approach so divorced from the threat to maritime commerce. The defect in the washer/dryer mattered little until the boat was docked at the marina and the defect caused a fire. Again, under the Seventh Circuit's test, *Sisson* would have come out differently. The installation of a washer/dryer in a pleasure boat does not bear a substantial relationship to traditional maritime activity. But the Court did not focus on that. It focussed instead on the precise activity that gave rise to tortious property damage—the storage and maintenance of the boat while docked in a marina—and concluded that that activity had a substantial relationship to traditional maritime concerns.

As to both the "incident" involved and the "activity giving rise to the incident," the court below asked different questions than *Sisson* allows. In a proper application of *Sisson*, it is easily seen that the incident—flooding of building basements—had no significant potential to disrupt commercial maritime activity, and that the activity giving rise to the incident—the operation of an underground tunnel connected to Loop buildings—bore no substantial

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tiffs were injured solely by the City's failure to maintain and repair the tunnel—is thus at odds with the Seventh Circuit's decision to identify Great Lakes' pile driving as the only relevant conduct.

[25] We have confined our analysis to the claims brought against Great Lakes and Great Lakes' asserted rights of contribution and indemnity on those claims against the City. There has never been any contention that plaintiffs' claims against the City fall within admiralty jurisdiction.

relationship to traditional maritime activity. What damaged these plaintiffs was water coming into their basements from an underground tunnel, an event that does not pose any inherent threat to maritime commerce and hence does not implicate the traditional concerns of maritime law. Indeed, in this respect, this case is analogous to *Executive Jet* because any connection to navigable waters is fortuitous and incidental. See 409 U.S. at 273. Thus, there is no basis for the exercise of federal admiralty jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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